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(2)

**IN THE SUPREME COURT
OF THE UNITED STATES
1994 TERM**

CLARENCE YODER AND LEONA YODER ..... PETITIONERS

v.

ELKHART COUNTY AUDITOR AND ELKHART
COUNTY TREASURER ..... RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI FROM THE
INDIANA COURT OF APPEALS

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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13 pp

ISSUE PRESENTED FOR REVIEW

Whether the due process clause of the Fourteenth Amendment is satisfied by mailed notice to the last known address of a property owner with respect to a property tax sale despite such notice being returned unclaimed?

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CITATIONS OF OPINIONS AND JUDGMENTS IN COURTS BELOW

The opinion of the court below is cited as Yoder v. Elkhart County Auditor and Elkhart County Treasurer, 632 N.E.2d 369, (Ind. Ct. App. 5 Dist. 1994), tran. denied, (Ind. 1994).

JURISDICTION

An adequate statement of the jurisdictional grounds for this case is contained in the Petition for Writ of Certiorari.

UNITED STATES CONSTITUTIONAL PROVISION AND STATE STATUTES INVOLVED

The provision of the Constitution and state statutes upon which the Petitioner relies is contained in the Petition for Writ of Certiorari. Respondents, however, would point out an apparent failure of the Petitioners to comply with Rule 29.4(c) of the Supreme Court Rules. Petitioners are necessarily challenging the constitutionality of the Indiana State statutes governing property tax sales with respect to notice requirements in relation to the standards of due process established under the Constitution. Respondents cannot locate any recitation in the Petitioners' initial filing that 28 U.S.C. § 2403(b) may be applicable nor that service has been made upon the attorney general of the State of Indiana.

STATEMENT OF THE CASE

The appeal below and this Petition for Writ of Certiorari involve the validity of and the procedures used in conducting a tax sale in Elkhart County, Indiana for delinquent real estate taxes. Because the real estate taxes had been unpaid for more than two (2) years, certain real estate owned by the Petitioners, Clarence and Leona Yoder ("Yoders"), was placed in the 1985 property tax sale in Elkhart County. (Exhibits 1 and 2 attached to Deposition of Wray, p. 151). Richard C. Adams ("Adams") purchased this real estate at the tax sale on or about August 12, 1985. Since the property was not redeemed within the statutory redemption period, Adams was issued a tax deed to the property on or about August 12, 1987. (Affidavit of Adams, pp. 36-37).

Once it was determined the property would be entered in the tax sale, the Elkhart County Auditor ("Auditor") sent notice of the tax sale by certified mail to the Yoders at 524 E. Lincoln Ave., Goshen, Indiana on or about June 27, 1985. This notice was returned unclaimed. (Deposition of Wray, p. 124). The 524 E. Lincoln Ave. address was the last known address of the Yoders according to the records in the office of the Auditor. (Deposition of Wray, p. 124). Upon receipt of the unclaimed notice, the Auditor's office took affirmative action to find another address for the Yoders by looking in the R.K. Polk City Directory. The Auditor's office found an address for Yoder Feed Company at 524 E. Lincoln Ave. (Deposition of Wray, pp. 125-127). The Auditor's office sent the Notice of Tax Sale a second time on or about July 16, 1985 to the Yoders in care of Yoder Feed Service; however, it still came back unclaimed. (Deposition of Wray, pp. 125-126). Contrary to the Petition for Writ of Certiorari (p. 6), Yoder, according to his own affidavit, owned and operated Yoder Feed Service at 524 E. Lincoln Ave., Goshen, Indiana until October, 1985 when he closed the business and no longer received mail at that location. (Affidavit of Yoder, p. 40).

After unsuccessfully attempting to notify the Yoders, Elkhart County sold the real estate to Adams on or about August 12, 1985.

Approximately two (2) years later, the Auditor's office sent the Notice of Tax Sale Redemption or Issuance of Deed to the Yoders on or about July 14, 1987 to 524 E. Lincoln Ave. (Deposition of Pinkerman, p. 102). This notice was also returned unclaimed. The 524 E. Lincoln address was the last known address maintained in the records of the Auditor's office and the only address that the Auditor's office could find for the Yoders. Again, the Auditor's office took further action by checking the R.K. Polk City Directory and by asking various individuals about Clarence Yoder's whereabouts. However, no one knew where he could be located. (Deposition of Pinkerman, pp. 104-105). Therefore, a tax title deed was issued to Adams as the successful tax sale purchaser on or about August 12, 1987.

After Adams was issued the deed to the property, the Yoders filed an "Action to Quiet Title to Real Estate" on or about November 19, 1987 which included Adams, the Elkhart County Auditor, and the Elkhart County Treasurer as Defendants. On October 31, 1988, the trial court granted Adams' motion for summary judgment against the Yoders holding that the tax sale was valid. The Yoders commenced an appeal in the Indiana Court of Appeals, but before filing their appellate brief, the Yoders settled their dispute with Adams and dismissed their appeal.

The Yoders attempted to renew the litigation at the trial court level by filing a motion for summary judgment on September 24, 1990 against the Elkhart County Auditor and the Elkhart County Treasurer. The Yoders alleged that the Elkhart County Auditor and the Elkhart County Treasurer failed to provide adequate notice of the tax sale. On January 21, 1991 the trial court upheld the validity of the tax sale and granted summary judgment in favor of the Elkhart County Auditor and the Elkhart County Treasurer.

The Yoders appealed and on April 7, 1994, the court of appeals upheld the notice procedures used by the Elkhart County Auditor and affirmed the trial court's decision granting the motion for summary judgment in favor of the Elkhart County Auditor and Elkhart County Treasurer. The Indiana Supreme Court, on July 19, 1994, denied transfer without an opinion.

SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari should be denied for three significant reasons. First, mailed notice by certified mail with return receipt requested to a property owner at his or her last known available address for purposes of a tax sale satisfies due process even when such notices are returned unclaimed. Due process merely requires that notice be reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objection. This Court has repeatedly recognized that mail service is an inexpensive and efficient mechanism that is reasonably calculated to provide actual notice. The fact that an article of mail is returned unclaimed does not render the notice deficient from a due process standpoint. Second, though not required by due process standards, the office of the Elkhart County Auditor went still further and exercised reasonable efforts to locate an alternative address for the Yoders when the notices were returned unclaimed. The fact that those efforts were unsuccessful does not alter the outcome of this case. Finally, the procedural posture of this case renders it particularly inappropriate to render a decision of constitutional dimension. An issue of state law, being res judicata, remains unresolved and undecided. Thus, a reversal at this stage of the proceedings would require a remand for consideration of the state law issue which might then render the determination of this Court inconsequential. For all of these reasons, the Petition for Writ of Certiorari should be denied.

ARGUMENT

I. THE ELKHART COUNTY AUDITOR USED TAX SALE NOTICE PROCEDURES WHICH SATISFY THE DUE PROCESS REQUIREMENTS ESTABLISHED BY THE CONSTITUTION.

The Petition for Writ of Certiorari should be denied because this Court has already addressed the applicable due process standard in Mennonite Board of Missions v. Adams, (1983), 462 U.S. 791, 103 S.Ct. 2706, 77 L.E.2d 180. In that case, this Court established the requirements for tax sale notice. Since the Auditor followed those requirements by mailing notice to the Yoders at their last known address, the notice sent to the Yoders was sufficient and the tax sale was valid. Due process does not require nor guarantee actual notice. The Yoders argue that the Auditor should have further utilized "reasonable business practices" to find an accurate mailing address for them when the mailed notices were returned unclaimed. The Yoders' contention means that the Auditor's office should have done more than what is constitutionally required due process in its attempt to notify the Yoders. The Auditor, however, complied with the due process requirements by sending notice to the Yoders at the last known address of the Yoders that was maintained in the office of the Auditor. Thus, no substantial question has been presented to this Court for review.

The constitutional due process standard of notice for an action which will affect property interests requires "notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objection." Mullane v. Central Hanover Bank and Trust Company, (1950), 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865. This Court discussed the requisite notice for a tax sale in Mennonite Board of Missions. This Court stated the constitutional due process standard as to notice of a tax sale in the following way:

> When the mortgagee is identified in a mortgage that is publicly recorded, constructive notice by

> publication must be supplemented by notice mailed to the mortgagee's last known available address, or by personal service. Mennonite Board of Missions, 462 U.S. at 798.

Thus, pursuant to the standard established in Mennonite Board of Missions, in order to satisfy the due process requirement for tax sale notice, the notice must be sent to the last known available address of the owner of the affected property interest. The Auditor satisfied that standard. The last known address the Yoders maintained in the Auditor's office was 524 E. Lincoln Ave. When the first notice of Tax Sale came back unclaimed, the Auditor sent a second notice which also came back unclaimed. The 524 E. Lincoln address was the only address for the Yoders in the Auditor's records.

Near the end of the statutory redemption period, the Elkhart County Auditor sent a final notice to the Yoders. Again, the Auditor sent the notice to the last known address of the Yoders. Upon searching the records, the last known available address was still 524 E. Lincoln Ave. There was no other address for the Yoders in the Auditor's records. The Notice of Tax Sale Redemption or Issuance of Deed sent to the Yoders came back unclaimed. Further efforts were made to locate another address for the Yoders without success. After the redemption period ended and the Yoders had not responded, the Auditor proceeded to issue the tax deed to Adams and conclude the tax sale. Throughout this entire process, the Auditor's office satisfied the due process requirements for notifying an owner or former owner of the tax sale by using mailed notice to the last known address for the Yoders; consequently, the Elkhart County Auditor provided adequate notice to the Yoders.

II. ALTHOUGH NOT REQUIRED TO SATISFY DUE PROCESS STANDARDS, WHEN THE NOTICES SENT TO THE YODERS CAME BACK UNCLAIMED THE ELKHART COUNTY AUDITOR TOOK ADDITIONAL STEPS TO FIND ANOTHER ADDRESS FOR THE YODERS.

In the present case, the Elkhart County Auditor sent notice to 524 E. Lincoln Ave. This was the last known address the Yoders maintained in the records of the Auditor's office. The Auditor did not look for another address in the local telephone book, but did consult the City Directory. Although it was unnecessary, the Auditor's office did make an effort to look for another address of the Yoders. The procedure used by the Auditor satisfied and even went beyond due process requirements.

Even if this Court held that the Elkhart County Auditor had an affirmative duty to inquire about the Yoder's address after notices were returned unclaimed, the Auditor's actions would satisfy such a requirement. The Elkhart County Auditor did not have a legal duty to search for another address, but a reasonable attempt was made to find another address for the Yoders by using the City Directory and by requesting information from other employees in the Auditor's office. The fact that the employees in the office of the Elkhart County Auditor were unsuccessful in locating an accurate address for the Yoders does not invalidate the notice given and the tax sale conducted. Thus, the Elkhart County Auditor complied with the due process requirements concerning notice of the tax sale and notice of the redemption rights by sending the notices by certified mail to the last known address for the Yoders.

The Elkhart County Auditor's office went beyond its constitutionally required duty to provide notice to the owner of the impending tax sale. The Elkhart County Auditor took affirmative steps in attempting to locate another address for the Yoders. Although the attempt was unsuccessful, it does not follow that the notice was insufficient. The fact that an employee in the office of the Elkhart County Treasurer had an address for a Clarence Yoder in 1987 near the expiration of the redemption period does not change the result. First, the Elkhart County Treasurer and the Elkhart County Auditor are separate constitutional offices in the State of Indiana with independent obligations and responsibilities. The Elkhart County Treasurer does not have any part in the mailing of tax sale or redemption right notices; the responsibilities for those actions are vested in the office of the Elkhart County Auditor by statute in Indiana. Second, there was no knowledge at the time in 1987 that this other address was the correct and known address for

the same Clarence Yoder involved in this case. It was merely an address for a Clarence Yoder. The address was not available in the Auditor's office and cannot even be considered as a "known" address for the Yoders in 1987. The Auditor therefore afforded proper legal notice to the Yoders by mail at their last known address. Consequently, adequate legal notice was given to the Yoders in accordance with statutory and constitutional standards. Since notices were properly given, the tax sale was validly held.

III. EVEN IF THIS COURT WERE TO CONSIDER AN EXPANSION OF THE HOLDING FROM MENNONITE BOARD OF MISSIONS, THIS CASE WOULD NOT PROVIDE THE COURT WITH AN APPROPRIATE PLATFORM TO DO SO BECAUSE OF ITS PROCEDURAL POSTURE.

At an earlier stage of these proceedings in 1988, the Yoders moved for summary judgment against Richard Adams, the tax sale purchaser, and all others quieting title to the real estate and finding the tax sale void. (Plaintiff's Motion for Summary Judgment, p. 69). At that time, the Yoders claimed that the Elkhart County Auditor and Elkhart County Treasurer did not give them adequate notice of the tax sale and of their redemption rights. Richard Adams similarly filed a motion for summary judgment claiming ownership to the subject real estate based upon his purchase at the tax sale and the issuance of a tax title deed in his favor. The trial court entered an Order on October 31, 1988 upon which Judgment was entered against the Yoders upholding the sale of the subject real estate and determining that the Elkhart County Auditor did all that was legally required in order to conduct a valid property tax sale. The Yoders then commenced an appeal in the Indiana Court of Appeals. Before filing their appellate brief, the Yoders settled their dispute with Adams and dismissed the appeal. Because of this adverse judgment and the subsequent dismissal of the appeal, the Yoders should be barred from proceeding on a claim for damages with respect to the tax sale against the Elkhart County Auditor and the Elkhart County Treasurer on the grounds of res judicata.

The Yoders attempted to renew the litigation at the trial court

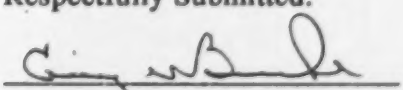
level by filing a motion for summary judgment on September 24, 1990 against the Elkhart County Auditor and the Elkhart County Treasurer again alleging a failure to provide adequate notice of the tax sale. The validity of the tax sale was upheld which led to the appeal and this Petition for Writ of Certiorari.

Because of the first judgment in this case in 1988 upholding the validity of the tax sale and the subsequent dismissal of the first appeal, the Elkhart County Auditor and the Elkhart County Treasurer contended that further proceedings are barred on the grounds of res judicata. The issue of res judicata was briefed at the trial level and on appeal although the Indiana Court of Appeals elected not to decide the issue. Yoder v. Elkhart County Auditor and Elkhart County Treasurer, 632 N.E.2d 369, n.1 (Ind. Ct. App. 5 Dist. 1994), tran. denied, (Ind. 1994). If this Court were to grant the Petition and hear the due process issue, all of the Court's work may go for naught because a reversal would necessitate a remand for purposes of deciding the state law issue of res judicata. Thus, the procedural posture of this case makes it particularly inappropriate for a decision of constitutional import.

CONCLUSION

For all the foregoing reasons, the Respondents, Elkhart County Auditor and Elkhart County Treasurer, respectfully request that this Honorable Court deny the Petition for Writ of Certiorari.

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